

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-190336

DATE: May 24, 1973

MATTER OF: Coast Iron & Machine Works, Inc.

DIGEST:

Award of contract was improper where actions of contracting agency were tantamount to waiver of clause requiring bidders to offer a "standard commercial product." However, in view of extent to which contract has been performed, GAO concludes that it would not be in Government's best interests to terminate contract for convenience.

Coast Iron and Machine Works, Inc. (Coast Iron) protests the award of two contracts to Clarke and Lewis, Inc. (C&L) under invitation for bids No. N00600-77-B-1694 (-1694) and oral solicitation No. N00600-77-C-2123 (-2123) issued by the Naval Regional Procurement Office, Washington, D.C. (Navy).

Each solicitation sought offers on a six-inch pipe bending machine. These machines are offered in two styles: hinged clamp ("shipboard") and swing arm ("standard"). Although both styles perform the same function, the shipboard bender is of a more compact design.

Coast Iron's original protest to this Office was founded upon the assumptions that both solicitations sought a shipboard bender and that both solicitations contained a standard commercial product clause which read as follows:

"The equipment to be furnished hereunder must be a manufacturer's standard commercial product.

For purposes of this contract, a standard commercial product is one which, within a period commencing two years prior to the opening date of this solicitation, has been sold by the manufacturer or his distributor in reasonable quantities to the general public or government in the course of conducting normal business operations. Nominal quantities, such as models, samples, prototypes, or experimental units will not be considered as meeting this requirement."

Coast Iron felt that if its two assumptions were correct C&L was incapable of qualifying for award under either solicitation. It is Coast Iron's position that C&L does not manufacture a shipboard bender that can qualify as a standard commercial product as that term is defined in the above quoted clause.

It subsequently developed that solicitation -2123 did not include the standard commercial product clause set out above. Coast Iron has recognized that the absence of the clause renders its protest of -2123 moot. (We have been advised by the Department of the Navy that C&L failed to deliver the machine by December 13, 1977, as required by contract -2123, and now anticipates delivering the entire machine including ancillary equipment by July 31, 1978.)

Turning to LFB-1694, the Navy reports that although the solicitation contained the standard commercial product clause, the specifications permit the manufacturer to provide either a standard or a shipboard bender. The issue then becomes one of whether C&L has the ability to furnish either a standard or a shipboard bender which is a standard commercial product within the meaning of the clause.

Bidders were not required to submit with their bids evidence of compliance with the standard commercial product clause. However, the preaward survey team reported that C&L "has furnished similar items in the past and is the original designer of many numerically controlled bending machines and has assigned patent rights to other machine tool manufacturers." With regard to C&L's technical capability, the team noted that "At the present time bidder has produced over 100 similar tube bending machines for commercial use and over 20 machines

for use by the Navy." The team concluded that C&L's performance record was satisfactory because, among other reasons, "the bending machine required for this procurement is similar to previously produced machines." Included within the preaward survey report was a photograph of a C&L machine with the legend "This machine is similar to the proposed procurement only requiring few minor changes."

Based upon this information, the contracting officer proceeded with award to C&L. However, in response to a post-award inquiry by the contracting officer which was prompted by Coast Iron's protest, C&L could identify only one standard six-inch pipe bender and two shipboard six-inch pipe benders which it had sold during the two years preceding issuance of the IFB. Only one shipboard bender had been delivered to the customer at the time of award: the other was still being fabricated.


In view of this information, we think that C&L had sold only "nominal quantities" of these items during the two years before the IFB was issued, and, therefore, C&L did not qualify for award.

We have held that where a solicitation requires a commercial product an award under such a solicitation must be preceded by a determination that the potential awardee will offer a commercial product and that it is improper to make an award if the intended awardee is incapable of furnishing a commercial product. Kepner Plastics Fabricators, Inc., Harding Pollution Controls Corporation, B-184451, June 1, 1976, 76-1 CPD 351. The rationale behind this position is our belief that the Government should not represent that it has minimum requirements of such a nature that it must restrict competition to only those who are capable of providing standard commercial product when in fact the Government's minimum needs can be fulfilled with the provision of something less than a standard commercial product. A solicitation which states requirements in excess of what is actually required is unduly restrictive of competition and the waiver of such excess requirement could well prove prejudicial to other bidders or potential bidders who did or did not bid in reliance upon its application. Haughton Elevator Division, Reliance Electric Company, B-184865, May 3, 1976, 76-1 CPD 294.

We believe that in the instant case, the actions of the contracting agency were tantamount to a waiver of the standard commercial product clause. First, the preaward survey team was not asked to examine whether C&L was offering a standard commercial product as defined by the clause. In this connection we note that the preaward survey team spoke in terms of "similar" machines previously produced by C&L, whereas the standard commercial product clause requires that "the equipment to be furnished hereunder must be a manufacturer's standard commercial product." (Emphasis added.) It also does not appear from the record that the contracting officer specifically determined prior to making award to C&L that the firm was offering a standard commercial product. Since the standard commercial product clause was, in effect, waived, the award to C&L was improper.

Delivery of the pipe bending machine was to have been made by April 15, 1978. However, we have been advised by the Department of the Navy that the contractor has completed approximately 50 percent of the work and that delivery is now scheduled for August 15, 1978.

In view of the extent to which the contract has been performed, we do not believe it would be in the best interests of the Government to terminate C&L's contract for convenience. By separate letter of today, however, we have brought this procurement to the attention of the Secretary of the Navy in order to preclude future similar deficiencies.


Deputy Comptroller General
of the United States